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No. 02-1580

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2002

RICHARD VIETH, et al., *Appellants,*

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, et al., *Appellees.*

On Appeal from the United States District Court for the Middle District of Pennsylvania

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MOTION TO AFFIRM

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MAY 30, 2003

QUESTIONS PRESENTED

1. Should a three-judge court's dismissal of a claim for partisan gerrymandering for failure to allege facts sufficient to establish the "actual discriminatory effect" required by *Davis v. Bandemer*, 478 U.S. 109 (1986), be summarily affirmed, when it is consistent with the decision in *Bandemer* and with the decisions of other three-judge courts, many of which have been summarily affirmed by this Court?

2. Is a claim that a congressional redistricting plan established by state law will elect a disproportionate number of representatives from one political party non-cognizable under U.S. CONST. art. I, §4?

3. As an alternative basis for affirmance, should this Court hold that voters who prefer the candidates of one party, in a state where voters frequently and massively engage in cross-over and split-ticket voting, cannot be considered an "identifiable political group" for purposes of asserting a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986)?

4. As an alternative basis for affirmance, should this Court reconsider and overrule its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), that a claim of partisan gerrymandering presents a justiciable political question?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

A. Facts Relevant to this Motion 2

B. Procedural History and Decisions Below 3

1. The order appealed from 5

2. The incorporated opinion and order 5

ARGUMENT 9

I. INSUBSTANTIAL QUESTIONS PRESENTED ... 9

A. "Discriminatory Effects" 9

B. Racial Gerrymandering Decisions 14

C. U.S. CONST. art. I, §4 18

II. ALTERNATIVE BASES FOR AFFIRMANCE ... 21

A. "Identifiable Political Group" 22

B. Partisan Gerrymandering is a Non-Justiciable Political Question 25

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) 19

Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) 6, 13

Baker v. Carr, 369 U.S. 186 (1962) 26

Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) 26

Bush v. Vera, 517 U.S. 952 (1996) 16

Chapman v. Meier, 420 U.S. 1 (1975) 29

Cook v. Gralike, 531 U.S. 510 (2001) 19

Davis v. Bandemer, 478 U.S. 109 (1986) ..... *passim*

Easley v. Cromartie, 532 U.S. 234 (2001) 15, 16

Fusari v. Steinberg, 419 U.S. 379 (1975) 22

Growe v. Emison, 507 U.S. 25 (1993) 29

Holloway v. Hechler, 817 F. Supp. 617 (S.D. W.Va. 1992), *aff'd*, 507 U.S. 956 (1993) 13

Hunt v. Cromartie, 526 U.S. 541 (1999) 15, 16

Jubelirer v. Vieth, 123 S. Ct. 67 (2002) 4

Jubelirer v. Vieth, 123 S. Ct. 68 (2002) 4

Karcher v. Daggett, 462 U.S. 725 (1983)..... 24

Martinez v. Bush, 234 F. Supp.2d 1275 (S.D. Fla. 2002)..... *passim*

Marylanders for Fair Representation v. Schaefer, 849 F. Supp. 1022 (D. Md. 1994)..... 13

Miller v. Johnson, 515 U.S. 900 (1995)..... 14, 15, 16

Mobile v. Bolden, 446 U.S. 55 (1980) 9, 11, 23, 24

O'Lear v. Miller, 222 F. Supp.2d 850 (E.D. Mich. 2002), *aff'd*, 123 S. Ct. 512 (2002) ..... *passim*

Oregon v. Mitchell, 400 U.S. 112 (1970) 20

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992)..... 13, 23

Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1992) 23

Reynolds v. Sims, 377 U.S. 533 (1964)..... 29

Schweiker v. Vieth, 123 S. Ct. 68 (2002) 4

Shaw v. Reno, 509 U.S. 630 (1993)..... 14, 15, 16, 17

Smiley v. Holm, 285 U.S. 355 (1932) 19

U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)..... 19

Vieth v. Commonwealth of Pennsylvania, 188 F. Supp.2d 532 (M.D. Pa. 2002) (*Vieth I*) ..... *passim*

Vieth v. Commonwealth of Pennsylvania, 195 F. Supp.2d 672 (M.D. Pa. 2002) (*Vieth II*)..... 4

Vieth v. Commonwealth of Pennsylvania, 241 F. Supp.2d 478 (M.D. Pa. 2003) (*Vieth III*)..... *passim*

Vieth v. Jubelirer, 123 S. Ct. 68 (2002)..... 4

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)..... 21, 22

Wesberry v. Sanders, 376 U.S. 1 (1964)..... 20

White v. Alabama, 867 F. Supp. 1571 (M.D. Ala. 1994)..... 13

White v. Weiser, 412 U.S. 783 (1973) 29

Wise v. Lipscomb, 437 U.S. 535 (1978)..... 29

DOCKETED CASES

Larios v. Perdue, No. 1:03-CV-0693 (N.D. Ga.) 14

CONSTITUTIONS

U.S. CONST. art. I, §4..... *passim*

STATUTES

28 U.S.C. §2284(a) 3

Act No. 2002-1 ..... *passim*

Act No. 2002-34 ..... *passim*

RULES AND REGULATIONS

Fed.R.Civ.P. 12(b)(1) 3

Fed.R.Civ.P. 12(b)(6) 3

Supreme Court Rule 18.6..... 1

MISCELLANEOUS

2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-292 (1st ed. 1833)..... 20

Daniel Hays Lowenstein, "Bandemer's Gap: Gerrymandering and Equal Protection," POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman, ed. 1990)..... 23

Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443 (1988)..... 24

John Sullivan & Mario F. Cattabiani, "Rendell's Old Foes Become Donors," THE PHILADELPHIA INQUIRER (February 1, 2003) A01 9

Official Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/cwp/view.asp?a=1099&q=431588..... 2

Official 2001Municipal Election Results (Supreme, Superior & Commonwealth Courts), PA Dept. of State (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M 3

Official 2002 General Elections Results (Governor), PA Dept. of State (http://webdos.pa.state.us/elections/elec_results/dsf/statewide1.cgi?choice=Gov&eyear=2002&etype=G) 8

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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, Robert C. Jubelirer, President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and John M. Perzel, Speaker of the House of Representatives of the Commonwealth of Pennsylvania ("Presiding Officers") (Appellees herein and Defendants below[1]), move to affirm the order below because the questions presented by Appellants for review are so insubstantial as to require no further briefing or oral argument and because alternative bases for affirmance exist.

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[1] Representative John M. Perzel was elected Speaker after the death of Matthew J. Ryan and was substituted as a Defendant in this matter by order of the three-judge court below dated April 17, 2003.

STATEMENT OF THE CASE

A. Facts Relevant to this Motion

As a result of reapportionment following the 2000 Census, the Commonwealth of Pennsylvania lost two seats in U.S. House of Representatives (from 21 to 19).

Based on the now-official voter registration data for Nov. 2001, there were 3,733,739 registered Democrats; 3,233,171 registered Republicans; 3,266 registered Green party members and 803,365 other registered voters in Pennsylvania. Am. Com. ¶25; App. at 137a; *see* Official Voter Registration Data Nov. 2001, PA Dept. of State www.dos.state.pa.us/bcel/cwp/view.asp?a=1099&q=431588. Using these data, Democrats account for 48%, Republicans account for 41.6% and others account for 10.4% of the registered voters. No party has a majority.

In the 2000 general election, 11 Republicans and 10 Democrats were elected to Congress. Am. Com. ¶15; App. at 132-33a. In the five statewide elections held in 2000, Republicans won 3 races (U.S. Senator, Attorney General and State Treasurer) and Democrats won 2 races (President and Auditor General). Am. Com. ¶27; App. at 138a.[2]

The Democrat party is not a minor party in the Commonwealth. *See* Am. Com. ¶25; App. at 137a. Registered Democrat voters do not vote in a cohesive manner; rather, they engage in much cross-over and split-ticket voting. *See* Am. Com. ¶25 (disregarding voters registered with minor parties or as non-affiliated, Democrats have a 53.6% to 46.4% advantage as between registered Democrat and Republican voters); App. at 137a.

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[2] Other than for President, Plaintiffs allege the vote percentage won by Republican and Democrat candidates based only on the totals for those two parties' candidates: U.S. Senator (53.5%R, 46.5%D); Attorney General (55.6%R, 44.4%D); Auditor General (41.3%R, 58.7%D); State Treasurer (51.1%R, 48.9%D), excluding votes for other candidates. Am. Com. ¶27; App. at 137-183a.

In five statewide races in 2000, only the Democrat candidate for Auditor General received at least 53.6% of the vote. In the other four races, the largest percentage of Democrat votes (50.6%) was received by the Democrat candidate for President, while Democrat candidates for Attorney General, State Treasurer, and United States Senator all received less than 50% of the total votes cast for either a Democrat or Republican. *See* Am. Com. ¶27; App. at 137-138a. As these data reveal, registered Democrats frequently and massively vote for Republican candidates; they are not a cohesive group.[3]

B. Procedural History and Decisions Below

On January 7, 2002, a new state law, Act 2002-1 ("Act 1"), established district boundaries for the Commonwealth's 19 congressional seats. On January 11, 2002, Plaintiffs, Richard & Norma Jean Vieth and Susan Furey, filed a five-count amended complaint for declaratory and injunctive relief in the United States District Court for the Middle District of Pennsylvania, challenging the constitutionality of Act 1. App. at 128a. A three-judge court was convened pursuant to 28 U.S.C. §2284(a), and Presiding Officers and Executive Officers[4] each filed motions to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) & (6). On February 22, 2003, the

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[3] This trend continued in 2001 when Republicans won all seven statewide elections. The Republican candidate for Supreme Court received 52.7% of all votes cast; the three Republican candidates for Superior Court received 55% of all votes cast; and the three Republican candidates for Commonwealth Court received 57% of all votes cast. *See* Official 2001 Municipal Election Results (Supreme, Superior and Commonwealth Courts), PA Dept. of State (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M).

[4] Executive Officers were the other named defendants below (i.e., then-Governor of Pennsylvania Mark Schweiker, then-Secretary of the Commonwealth Kim Pizzingrilli and then-Commissioner of the Bureau of Commissions, Elections and Legislation Richard Filling).

three-judge court issued an opinion and order dismissing four counts, including the partisan gerrymandering claim, for failure to state a claim. *Vieth v. Commonwealth of Pennsylvania*, 188 F.Supp.2d 532 (M.D. Pa. 2002) ("*Vieth I*"); App. at 13a.[5]

After a hearing on the sole remaining count (alleged violation of the one-person, one-vote principle), the three-judge court, on April 8, 2002, declared Act 1 unconstitutional, enjoined its implementation, and directed the Pennsylvania General Assembly to "within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." *Vieth v. Commonwealth of Pennsylvania*, 195 F. Supp.2d 672, 679 (M.D. Pa. 2002) ("*Vieth II*"); App. at 46a, 57a.[6]

On April 17, 2002, the General Assembly passed a bill containing a revised congressional redistricting plan, which, on April 18, 2002, the Governor signed into law as Act No. 2002-34 ("Act 34"). Act 34 repeals Act 1 and puts in place a revised congressional redistricting plan for Pennsylvania. Act 1 was used for the 2002 congressional election cycle but is superseded by Act 34 for the 2004 and future congressional elections.[7]

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[5] Plaintiffs appealed from this order (No. 01-1873), challenging the dismissal of the partisan gerrymandering claim; Presiding Officers filed a Motion to Dismiss or Affirm, and a conditional cross-appeal (No. 02-135), raising the two issues now raised as alternative bases for affirmance. Both appeals were dismissed as moot on October 7, 2002. *Vieth v. Jubelirer*, 123 S. Ct. 68 (2002); *Jubelirer v. Vieth*, 123 S. Ct. 68 (2002).

[6] Presiding Officers and Executive Officers appealed from this order (Nos. 01-1817 and 01-1823), which appeals were dismissed as moot on October 7, 2002. *Jubelirer v. Vieth*, 123 S. Ct. 67 (2002); *Schweiker v. Vieth*, 123 S. Ct. 68 (2002).

[7] On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order and permitted Act 1 to govern the 2002 congressional elections.

On April 22, 2002, Plaintiffs filed a motion requesting the three-judge court to begin remedial proceedings. In the motion, Plaintiffs attacked the constitutionality of Act 34, purporting, *inter alia*, to "renew" their partisan gerrymandering claim. Plaintiffs asked the three-judge court to either impose one of Plaintiffs' alternative maps as a remedial plan or draw its own. Presiding Officers opposed the motion.

1. The order appealed from

On January 24, 2003, the three-judge court denied Plaintiffs' motion and entered judgment for Defendants, upholding the constitutionality of Act 34. *Vieth v. Commonwealth of Pennsylvania*, 241 F. Supp.2d 478 (M.D. Pa. 2003)("*Vieth III*"); App. at 1a. With regard to the partisan gerrymandering claim, the court stated:

> Plaintiffs presented the same argument with respect to Act 1. In Vieth I, the court dismissed this claim because 'Plaintiffs [did not] allege facts indicating that they have been shut out of the political process and, therefore, they cannot establish an actual discriminatory effect on them,' as required by Davis v. Bandemer. Act 34 is essentially the same redistricting plan as Act 1, except for the fact that Act 34 does not possess an avoidable population deviation. Accordingly, whatever partisan effect Act 1 had, Act 34 will have as well. The court, therefore, *incorporates by reference its discussion in Vieth I regarding partisan gerrymandering* and holds that the undisputed facts in this case are insufficient to establish such a claim.

Vieth III, 241 F. Supp.2d at 484-485, App. at 11a-12a (internal citations omitted, brackets in the original, emphasis added).

2. The incorporated opinion and order

In addressing the motion to dismiss in *Vieth I* (i.e., the opinion incorporated into *Vieth III*), the three-judge court first set forth the three-prong *Bandemer* analysis: a

plaintiff must "'prove both [1] intentional discrimination against an [2] identifiable political group and an [3] actual discriminatory effect on that group.'" *Vieth I*, 188 F. Supp.2d at 543 (quoting 478 U.S. at 127); App. at 32a.

The court ruled against Defendants on the first two prongs of the *Bandemer* analysis (i.e., discriminatory intent and "identifiable political group"), and, with respect to "identifiable political group," stated:

> Defendants contend that Plaintiffs have failed to allege facts demonstrating that Democrats in Pennsylvania vote as a block. However, Defendants do not point to any authority which would require such an allegation. The court has scoured the *Bandemer* decision and has found no such requirement. Instead, the court finds that *Bandemer* indicates that Plaintiffs must allege only that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines. Clearly, by alleging that they are Pennsylvania citizens who vote for Democrats, Plaintiffs have satisfied this requirement.

188 F. Supp.2d at 543-44; App. at 32a.

The partisan gerrymandering claim was ultimately dismissed for failure to plead an "actual discriminatory effect" to satisfy the third *Bandemer* prong. The three-judge court began its analysis by noting that while *Bandemer* "offers little concrete guidance" as to the third prong, the result in that case, understood in terms of the evidence presented, could be drawn upon for aid. *Vieth I*, 188 F. Supp.2d at 544; App. at 33-34a. The court also examined the decision in *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989), pointing out that it had been summarily affirmed by this Court. 188 F. Supp.2d at 454 n.12; App. at 34-36a. Then, drawing on both its understanding of *Bandemer* and the analysis in *Badham*, the court summarized the allegations before it:

> In this case, Plaintiffs' allegations amount to this: Act 1 [and by extension Act 34] is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates. Due to this impediment, 'the Democratic Party will have greater difficulty in fielding competitive candidates.' Thus, Act 1 [and by extension Act 34] operates 'to essentially shut Democrats and Democratic voters out of the political process.' Plaintiffs, in particular, 'will suffer harm ... [because they] will now be increasingly represented by members of Congress who do not represent their views.'

188 F. Supp.2d at 546; App. at 36-37a (internal citations omitted; brackets original). The court then rejected these allegations as insufficient to allege discriminatory effects under *Bandemer*.

First, the court characterized the allegations as amounting to nothing more than a plea for proportional representation which "*Bandemer* soundly rejected [as] a basis for an equal protection violation." 188 F. Supp.2d at 546; App. at 37a. Second, since *Bandemer* had explicitly rejected the assumption that those who vote for a losing candidate will not be adequately represented by the winning candidate, Plaintiffs' allegation that, as Democrats, they will be represented in Congress by Republicans who do not share their views, was irrelevant. *Id.* Third, focusing on the relevant group – i.e., Pennsylvania Democrat voters, *not* the Democrat party – the court explained: "Stripped to its bones, Plaintiffs' allegations, in this respect, amount to a claim that Act 1 [and by extension Act 34] will make it more difficult for them to elect Democratic candidates to Congress. However, this simply is not the end-all be-all constitutional analysis that Plaintiffs make it out to be." *Id.*; App. at 38a. For support, the court quoted the following passage from the *Bandemer* plurality opinion:

> '[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render the scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. ... Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.'

188 F. Supp.2d at 546-47 (quoting *Bandemer*, 478 U.S. at 131-132) (ellipsis in the original); App. at 38a.

Finally, the court noted that Plaintiffs' allegations failed to support their conclusory argument that Act 1 [and by extension Act 34] "'essentially shuts ... Democratic voters out of the political process'" as "there are no allegations that anyone has ever prevented, or will prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 547; App. at 38-39a.[8]

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[8] In their Jurisdictional Statement, Appellants state that the results of the November 2002 general election "confirmed the extreme partisan bias of Act 1 (and by extension Act 34)." J.S. at 10. Those results, however, confirm why Appellants could not have shown discriminatory effect under *Bandemer*. First, Republicans won only 12 congressional seats and not the 13 or 14 Appellants had predicted. Second, the 2002 Democrat candidate for Governor of Pennsylvania (Ed Rendell) won by approximately 320,000 more votes than his Republican challenger and got 53.4% of the total votes cast, including those cast for the Green and Libertarian party candidates. *See* Official 2002 General Elections Results (Governor), PA Dept. of State (http://web.dos.state.pa.us/elections/elec_results/dsf/statewide1.cgi?choice=Gov&eyear=2002&etype=G). During his bid for the governorship, Rendell shattered the state record for campaign fund-raising. John Sullivan & Mario F. Cattabiani, "Rendell's Old Foes Become Donors," THE PHILADELPHIA INQUIRER (February 1, 2003) at A01 ("During his run for governor, Rendell amassed a war chest of $42 million, nearly three times the state record for campaign fund-raising."). The reality is that Democrat voters are able to and do influence the political process in Pennsylvania. *See Bandemer*, 478 U.S. at 132; *see also O'Lear v. Miller*, 222 F. Supp.2d 850, 856 (E.D. Mich. 2002), *aff'd*, 123 S. Ct. 512 (2002) (reasoning that a disfavored party's chance of "doing better" in the next reapportionment is affected by that party's hold on other state offices such as the governorship).

ARGUMENT

I. INSUBSTANTIAL QUESTIONS PRESENTED

The Court should summarily affirm the order in *Vieth III* dismissing the partisan gerrymandering challenge to Act 34 for failure to state a claim.

A. "Discriminatory Effects"

In *Bandemer*, a plurality of this Court set forth the standard for assessing claims of unconstitutional partisan gerrymandering under the Fourteenth Amendment. To state a claim, a plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127 (citing *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980)). Unlawful discrimination occurs in this context "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political system as a whole." 478 U.S. at 132. A "mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination" because an equal protection violation occurs only where "a history of disproportionate results appear[s] in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 132, 139. This "indicia" requirement was patterned on challenges brought by racial groups to individual multi-member districts, where the

racial minorities had "essentially been shut out of the political process." *See id.* at 139.

Appellants' partisan gerrymandering claim against Act 1, and by extension Act 34, faltered under a straightforward application of the strict *Bandemer* "discriminatory effects" test, not from some "construction of *Bandemer* that [] essentially overrule[d] it." *See* J.S. at 17. The fact that partisan gerrymandering claims typically rise or fall on the "discriminatory effects" prong of the analysis *is by design* and derives from the standard set forth by the *Bandemer* plurality itself, and not, as Appellants posit, from some extreme misinterpretation of that standard crafted and followed by the lower courts. The *Bandemer* plurality recognized partisan gerrymandering claims as justiciable but purposefully established a difficult standard.

It is evident throughout the *Bandemer* plurality opinion that the requisites for a cause of action for partisan gerrymandering were intended to be stringent. Stressing that neither the Constitution nor prior precedent of the Court requires proportional representation of political parties in Congress, the *Bandemer* plurality explained (in language specifically quoted, in part, by the three-judge court below, 188 F. Supp.2d at 546-547; App. at 38a), that:

> the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district ... . Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of

> proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 & n.7). The *Bandemer* plurality was unwilling to presume that "those who are elected will disregard the disproportionately underrepresented group." *Id.* at 132. It explained that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.*

The *Bandemer* plurality both distinguished and analogized between vote dilution in an individual district and statewide, again summarizing the principles that would guide its analysis:

> [A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 133. The plurality was particularly leery of setting the threshold for a partisan gerrymandering claim too low.

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step towards that end, which would be so much at odds with our history and experience.

Id. at 133-34.

The *Bandemer* plurality recognized the difficulties inherent in the standard they had set: "Determining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole' *is of necessity a difficult inquiry*." *Id.* at 143 (internal citations omitted; emphasis added). Thus, it is evident that the *Bandemer* plurality intended that the requisite discriminatory effects would to be difficult to show.

Appellants propose a different standard than every court that has ever applied *Bandemer* and one without grounding in *Bandemer* itself. They suggest that unless "redistricting [] achieve[s] a 'level of parity between votes and representation sufficient to ensure ... that majorities are not consigned to minority status,'" illegitimate partisan gerrymandering has occurred. *See* J.S. at 15 (quoting *Bandemer*, 478 U.S. at 125 n.9); *see also id.* at 17 (suggesting that *Bandemer* clearly indicates that "a State may violate the Equal Protection Clause when it consigns a political majority to minority status"), *id.* at 22 ("under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to roughly one-third or less of the congressional seats, even if that party consistently wins a majority of the popular vote statewide").

Appellants' "consigning" argument appears to spring from Justice O'Connor's criticism in *Bandemer* that, in finding partisan gerrymandering justiciable, the plurality made an illegitimate policy determination to favor proportional representation. *See* 478 U.S. at 125, n.9. However, it does not appear anywhere in the plurality's discussion of the elements of a partisan gerrymandering claim. Appellants are attempting to merge the plurality decision in *Bandemer* with Justice O'Connor's critical characterization of that decision, so as to cobble together a purported majority view.

Appellants are seeking to transform a rationale for justiciability into a standard of proof in order to ease their burden to state a partisan gerrymandering claim. But as

every three-judge court addressing the issue has recognized, the *Bandemer* plurality established a standard that would be most difficult to meet. The impact of that standard on the ability of voters affiliated with major political parties to state a claim for partisan gerrymandering is a function of the standard itself and does not derive from an improper interpretation of *Bandemer*.

Accordingly, the three-judge court below did not err in its choice of standard or in its application of that standard to the amended complaint. The court's analysis is consistent with that of numerous other three-judge courts that have dismissed partisan gerrymandering claims for lack of allegations sufficient to meet the discriminatory effects prong of the *Bandemer* standard, many of which have been summarily affirmed by this Court on direct appeal. *See e.g., O'Lear v. Miller*, 222 F. Supp.2d 850 (E.D. Mich.), *aff'd*, 123 S. Ct. 512 (2002) (motion to dismiss); *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (motion to dismiss); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) (motion to dismiss); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W.Va. 1992), *aff'd*, 507 U.S. 956 (1993) (motion to dismiss); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (defendants' motion for summary judgment); *White v. Alabama*, 867 F. Supp. 1571 (M.D. Ala. 1994) (defendants' motion for summary judgment). *See also Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002) (partisan gerrymandering claim dismissed after trial).[9]

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[9] Appellants attempt to distinguish this case by characterizing Acts 1 and 34 as exhibiting an extreme level of partisan bias against Democrat voters. *See* J.S. at 18 & n. 7. They compare Acts 1 and 34 to maps in Michigan and Florida, without acknowledging that those maps (which were challenged as having been drawn to produce a 10/5 and 18/7 advantage for Republicans) have been upheld against partisan gerrymandering challenges. *See O'Lear*, 22 F. Supp.2d 850 (E.D. Mich. 2002), *aff'd*, 123 S. Ct. 512 (2002); *Martinez*, 234 F.Supp.2d 1275 (S.D. Fla. 2002). Appellants also fail to acknowledge that the congressional redistricting map in Georgia, where Democrat

Contrary to Appellants' assertion that confusion reigns among the lower courts and that the time has come for this Court to reassess *Bandemer* and declare it no paper tiger, it appears that the lower courts, including the three-judge court in this case, understand well the height of the barrier to partisan gerrymandering claims. The order below should be summarily affirmed.

B. Racial Gerrymandering Decisions

Appellants contend that Act 34 is unconstitutional under the principles announced in two cases decided in the racial discrimination context - *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). J.S. at 22-25a. They ask the Court, having held in *Shaw* and *Miller* that redistricting using the consideration of *race* to the exclusion of other traditionally-neutral districting principles was unconstitutional, to "take the next step and recognize that equally irregular districts drawn predominantly on the basis of voters' political viewpoint are also constitutionally suspect." J.S. at 25. This invitation was rejected by the three-judge court in *O'Lear* in an opinion summarily affirmed by this Court. 222 F. Supp. at 858 n.5 ("We find no support in either [*Shaw* or *Miller*] for th[e] proposition" that "mere failure to use politically neutral principles itself violates the Equal Protection Clause"), *aff'd*, 123 S. Ct. 512 (2002), and in *Martinez*, 234 F.Supp.2d at 1348 n.99.

The three-judge court below was absolutely correct in not relying on *Shaw* or *Miller* to interpret *Bandemer* or to recognize a theory of partisan gerrymandering independent of *Bandemer*. The concepts applicable to partisan gerrymandering and racial gerrymandering are not interchangeable. While the plurality in *Bandemer* did derive its standard for a *prima facie* showing of partisan gerrymandering from the Court's racial gerrymandering

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lawmakers constituted the majority of the state legislators, has also been challenged as a partisan gerrymander. *Larios v. Perdue*, No. 1:03-CV-0693 (N.D. Ga.) (complaint filed March 13, 2003).

decisions, the partisan gerrymandering showing, as the plurality stressed, is different from that applied to other equal protection claims, including allegations of racial gerrymandering. *See Bandemer*, 478 U.S. at 134 n.14 ("The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.").

To establish a *prima facie* showing of racial gerrymandering in a redistricting context, a plaintiff must show that:

> race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State 'can defeat a claim that a district has been gerrymandered on racial lines.'

Miller, 515 U.S. at 916 (quoting *Shaw*, 509 U.S. at 647) (emphasis added). This is a very different showing than that required under *Bandemer*. *See* 478 U.S. at 127 (plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

Importantly, in *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), this Court deemed "constitutional political gerrymandering" (i.e., that which is not invalid under *Bandemer*) to be a "traditional race-neutral principle." *See also Easley v. Cromartie*, 532 U.S. 234 (2001) (concluding that "politics" and not race was the predominant reason for how the challenged district was drawn). In *Hunt*, this

Court concluded that summary judgment for those challenging the plan was improper because there was a material question of fact whether the legislature's predominant intent in drawing the challenged district was political or racial. In neither *Hunt* nor *Easley* did this Court provide an exclusive list of what constitutes permissible "political" intent. Among the political items asserted by the plan's defenders were "the intent to make [the challenged district] a strong Democratic district" and "protect[ing] incumbents." *Hunt*, 526 U.S. at 549. In other words, it can be legitimate for politics to be a predominant reason for drawing districts, but it is never legitimate for race to be so.

Another difference between racial and partisan gerrymandering is the level of scrutiny applied. For racial gerrymandering claims, once it is shown that race was the predominant reason for drawing a district, a *prima facie* showing has been made and the burden shifts to the plan's proponent to identify a compelling state interest to justify the use of race, i.e., strict scrutiny applies. *Miller*, 515 U.S. at 920. Strict scrutiny is used because race-based classifications are suspect. *See Shaw*, 509 U.S. at 642 ("racial classifications are immediately suspect"). Partisan gerrymandering is different. Classification on the basis of major political party, party registration, or voter performance is not suspect and is not, in and of itself, unconstitutional. Political gerrymandering is not subject to strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny."). In other words, only a rational basis need exist to support partisan gerrymandering. As this Court explained in *Shaw*:

> This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. *But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.* In fact, our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which always has

> reserved the strictest scrutiny for discrimination on the basis of race – would seem to compel the opposite conclusion.

509 U.S. at 650 (citations omitted; emphasis added).

The use of strict scrutiny every time partisan affiliation was used as a factor – even as the predominant reason – for drawing district lines, would create monumental problems. As the *Bandemer* plurality explained:

> [W]e [] reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one person, one vote imperative often mandates departure from this result ... .

478 U.S. at 133 (emphasis in the original).

In addition to these notable differences between the analyses for racial and partisan gerrymandering, the theory that Appellants would pull from the *Shaw* line of cases for application here – i.e., that a state legislature cannot redistrict in a fashion that subordinates all "traditional redistricting criteria" to achieve a certain partisan ends – was rejected by the *Bandemer* plurality. In responding to Justice Powell's suggested standard for identifying an unconstitutional partisan gerrymander, the plurality stated:

> [T]he crux of Justice Powell's analysis seems to be that – at least in some cases – the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection

> Clause in and of itself. We disagree, however, with this conception of a constitutional violation. Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.

478 U.S. at 138-139. The *Shaw* line of cases offers no guidance on the interpretation and application of *Bandemer*. Nor should these cases be read to support an independent theory of partisan gerrymandering under the Fourteenth Amendment.

C. U.S. CONST. art. I, §4

Appellants urge the Court to use this case to announce that U.S. CONST. art. I, §4 – independent of the Fourteenth Amendment – operates to forbid partisan gerrymandering.[10] They argue that "Article I strictly

[10] Appellants state that, in granting the motion to dismiss the "political gerrymandering claims," the three-judge court "examined those claims entirely within the framework ... in [] *Bandemer*, never acknowledging (despite a motion for reconsideration) Appellants' separate Article I arguments." J.S. at 6 (emphasis added). This recitation of events is misleading. *Vieth I*, which dismissed Claim II (partisan gerrymandering under the Fourteenth Amendment), left pending Claim I (one-person, one-vote). Plaintiffs filed a Motion for Clarification and/or Reconsideration, asking whether, by not dismissing Claim I, the three-judge court had left pending the partisan gerrymandering claim based on Article I (said to be encompassed within Claim I). Presiding Officers responded, *inter alia*, that because Plaintiffs had argued, in response to the motions to dismiss, that Article I operates as an independent restriction on partisan gerrymandering and because the court, in addressing Claim I, cited only the standard for resolving one-person, one-vote claims, Plaintiffs' Article I theory had been implicitly rejected. Plaintiffs' motion for reconsideration was denied. Notably, in "renewing" their partisan gerrymandering challenge to Act 34, Plaintiffs did not refer to Article I.

constrains the political faction that happens to control the state legislature at the right moment in the decennial redistricting cycle from dictating the composition of Pennsylvania's congressional delegation." J.S. at 29. Quoting from the dissent in *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F.Supp. 394, 402-03 (D. Md. 1991)(Niemeyer, J., dissenting), *aff'd*, 504 U.S. 938 (1992), Appellants argue that "[u]nder Article I, 'the State may not attempt to dictate the outcome of congressional elections' by drawing congressional districts that confer a substantial advantage on one political party." J.S. at 29. This argument was rejected by the three-judge court in *O'Lear*, 222 F.Supp.2d at 859, in an opinion summarily affirmed by this Court.

Plaintiffs, who fail to acknowledge this part of the *O'Lear* decision, support the asserted U.S. CONST. art I, §4 prohibition by interpreting decisions of this Court – decided in markedly different contexts – to stand for a general principle that "Article I forbids States from using their Elections Clause authority to thwart the will of the majority of voters ... ." J.S. at 25-26. U.S. CONST. art. I, §4, however, has never been used as an independent basis for invalidating congressional redistricting legislation as a political gerrymander and the cases relied on by Appellants offer no reason for it to be so used. *See U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (invalidating state constitutional amendment prohibiting the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate has already served set number of terms); *Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating state constitutional amendment providing that candidates for Congress who failed to support an attempt to amend the U.S. Constitution to include term limits would be noted as having so failed on the ballot).

U.S. CONST. art. I, §4 is an express grant of authority to state legislatures and to Congress to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the words of art. I, §4 "embrace authority to provide a complete code for

congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970) ("In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so.").[11] While this Court has stated that U.S. CONST. art. I, §4 cannot be used to "immunize state congressional reapportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), it has never recognized the provision as providing an independent, private cause of action for partisan gerrymandering in the context of redistricting by an affected individual. State legislatures or Congress, to which the regulation of the manner of holding elections is delegated, might have authority to impose such a restriction by statute, but, with respect to Appellants' attempted application of the restriction, U.S. CONST. art. I, §4 cannot be used to vindicate private interests.

Appellants' argument under U.S. CONST. art. I, §4 is essentially another plea for proportionality. A requirement of proportionality has been roundly rejected in the redistricting context. For example, as the plurality stressed in *Bandemer*, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination..." 478 U.S. at 132. As Justice O'Conner pointed out, such a requirement is inconsistent with the concept of electing representatives by districts:

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[11] As Justice Black noted in *Oregon*, U.S. CONST. art. I, §4 "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections." 400 U.S. at 119 n.2 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-292 (1st ed. 1833)).

> Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties. If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question: the voting strength of less evenly distributed groups will be invariably diminished by districting as compared to at-large proportional systems for electing representatives. Moreover, one implication of the districting system is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist – statewide elections for representatives along party lines.

478 U.S. at 159.[12]

Appellants offer no principled basis for constitutionalizing proportionality and thereby avoiding the difficult challenge of establishing the discriminatory effects requirement of *Bandemer* for unconstitutional partisan gerrymandering. The question they present regarding U.S. CONST. art. I, §4 is not substantial and offers no basis for this Court to do other than summarily affirm the dismissal.

II. ALTERNATIVE BASES FOR AFFIRMANCE

As a prevailing party, Presiding Officers may defend the judgment on any ground properly raised below whether or not relied upon, rejected, or even considered by the three-judge court. *See e.g., Washington v. Yakima*

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[12] Appellants attempted precisely what Justice O'Connor cautioned against. The Amended Complaint pleaded facts about statewide races to support the partisan gerrymandering claim. Ironically, the facts pleaded undercut the argument. E.g., in 2000, Democrat candidates won only 2 out of 5 statewide races. *See supra* n. 2 & 3.

Indian Nation, 439 U.S. 463, 476 n.20 (1979); *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975).

A. "Identifiable Political Group"

In *Vieth I*, as incorporated into *Vieth III*, the three-judge court ruled that Plaintiffs had alleged an "identifiable political group" as required by *Bandemer*. The Court could affirm the order below on the alternative basis that this conclusion was wrong as a matter of law.

The *Bandemer* plurality, despite setting forth the requirement that a plaintiff allege and prove the existence of an "identifiable political group," did not address whether such had been established in that case and provided no guidance on how that fact would be determined in subsequent actions.[13,14] Most lower courts addressing

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[13] The *Bandemer* plurality noted only "[t]hat the characteristics of the complaining [political] group are not immutable or that the group has not been subject to the same historical stigma [as racial groups] may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U.S. at 125. It is unclear whether the *Bandemer* plaintiffs formed an identifiable political group. *See also Bandemer v. Davis*, 603 F. Supp. 1479, 1482 (S.D. Ind. 1984) (three-judge court) (referring to plaintiffs as "citizens of Indiana and members of the Democratic Party"), *rev'd.* 478 U.S. 109 (1986); *id.* at 1492 (noting that plaintiffs "align" themselves with the Democrat party); *see also Bandemer*, 478 U.S. at 115 (noting that plaintiffs were "several Indiana Democrats").

[14] Justice O'Connor urged that neither major political party should be allowed to bring a claim for partisan gerrymandering:

> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process.

478 U.S. at 152 (O'Connor, J., concurring in the judgment only) (emphasis in the original). One commentator suggests that "the

partisan gerrymandering claims under *Bandemer* have paid scant, if any, attention to the requirement of an "identifiable political group."[15]

In defining an "identifiable political group," the Court should draw guidance from Justice Stevens' concurring opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile* involved a challenge by Afro-American voters to the validity of the at-large election of the governing body of the city (a three-member commission). This Court reversed a decision of the Court of Appeals for the Fifth Circuit, which, among other things, upheld a conclusion of the district court that the at-large election process violated the Fourteenth Amendment. In his concurring opinion, Justice Stevens addressed the thorny problem of identifying an identifiable group of voters:

> In the line-drawing [i.e., districting or redistricting] process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.

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cause of action the plurality is contemplating [in *Bandemer*] is not about Democrats and Republicans under normal conditions. It is about a political group suffering pervasive discrimination in the political process." Daniel Hays Lowenstein, "Bandemer's Gap: Gerrymandering and Equal Protection," POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman, ed. 1990) at 83.

[15] At least three lower courts have addressed this prong of *Bandemer*: *Martinez v. Bush*, 234 F. Supp.2d 1275 (S.D. Fla. 2002) (three-judge court) (analyzing "identifiable political group" according to the "Gingles factors" (i.e., geographical compactness, political cohesiveness and bloc voting by the majority group); *Pope v. Blue*, 809 F. Supp. 392, 396 n.3 (W.D. N.C. 1992) (three-judge court), *aff'd*, 506 U.S. 801 (1992) (merely noting that the only "coherent" theory was one in which the group was only Republican voters, as opposed to Republican voters joined by registered Democrats and Independents); *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1992) (allegation of registered Republicans and Democrats that they "have and will continue to vote for Republican candidates" sufficient to survive motion to dismiss).

> From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. *It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers – specifically the number of persons who will vote in the same way.*

Id. at 88 (Stevens, J., concurring) (emphasis added). *See also Karcher v. Daggett*, 462 U.S. 725, 754 (1983) (Stevens, J. concurring) ("As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class ... .").

To constitute a "politically identifiable group," a group must be one whose members vote the same, i.e., a cohesive group. *Bandemer*, when understood in terms of its origins, actually requires this, since only a cohesive group can suffer discriminatory effects as a result of an electoral scheme. *See Martinez*, 234 F.Supp.2d at 1334-1335 (to establish the causal link between the challenged electoral scheme and the vote dilution injury complained of, a plaintiff alleging a partisan gerrymander must show (1) geographical compactness of the minority group; (2) political cohesiveness of the minority group; and (3) block voting on the part of the majority group)). *See also* Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 479 (1988) ("In political gerrymandering, courts must find a correlation between Democrats and those who rigidly vote for Democratic candidates. ... To maintain a legitimate argument that 'Democrats' were unable to elect Democratic

candidates, the plaintiff group must, with at least some degree of specificity, point out which persons were denied an effective vote. Merely asserting that some dynamic, amorphous group had its votes diluted cannot suffice. ... Those who occasionally cross over party lines to vote for non-Democrats widen the gap between plaintiff groups and their representative political group. Because individual preferences in voting have become so prevalent, few, if any, large political organizations today can assert that their members consistently vote along straight party lines.").

In this case, Appellants' own allegations, which revealed widespread cross-over and split-ticket voting, should have been deemed fatal to their attempt to depict Democrat voters in Pennsylvania as an "identifiable political group." *See Martinez*, 234 F.Supp.2d at 1343-1344 (because voters often cross-over and vote for candidates of other parties, plaintiffs, who did not identify the voters but only a percentage of votes for Democrat candidates, failed to establish the cohesiveness of the group identified as voters who consistently vote Democrat).

B. Partisan Gerrymandering is a Non-Justiciable Political Question

In their motion to dismiss the amended complaint, Presiding Officers objected to the justiciability of the partisan gerrymandering challenge to Act 1. Although considering itself bound by *Bandemer* to consider the claim, the three-judge court noted the objection. *Vieth I*, 188 F. Supp.2d at 538; App. at 21a. In resisting Plaintiffs' challenge to Act 34, Presiding Officers maintained that Plaintiffs were bound by *Vieth I*. By incorporating *Vieth I* into its January 24, 2003 order in *Vieth III*, the three-judge court recognized the justiciability objection in conjunction with Act 34. This Court could affirm the order below on the alternative basis that partisan gerrymandering is a non-justiciable political question.

In *Bandemer*, this Court was asked whether a pure partisan gerrymandering claim presents a justiciable controversy or a non-justiciable political question. *See* 478

U.S. at 118. A majority, in an opinion by Justice White, determined that such a claim is justiciable. Justice O'Connor, joined by then-Chief Justice Burger and then-Justice Rehnquist, concluded the opposite in an insightful concurrence which highlighted the flaws and dangerous presumptions undergirding the plurality opinion and predicting the inevitable failure of the analytical framework it set forth.

Time and experience have proven Justice O'Connor correct – "[t]he Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Id.* at 147 (O'Connor, J., concurring in the judgment only). The Court should reconsider and overrule *Bandemer* and acknowledge that a partisan gerrymandering claim brought by a major political party presents a political question into which the judiciary cannot inquire.

An action presents a non-justiciable political question where there is "'a lack of judicially discoverable and manageable standards for resolving it,'" or where "'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion' is apparent." *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring in the judgment only) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Justice O'Connor explained that allowing a major political group to bring a partisan gerrymandering claim forces the judiciary to favor "some form of rough proportional representation for all political groups," thus presupposing an initial policy determination forbidden to the judiciary. *Id.* at 145. Past precedent establishing the one-person, one-vote principle and adjudicating the rights of racial minority groups reveals that it is the individual's right to vote – not the right of the group – that is the appropriate subject of judicial protection. Extending such protections to major political groups overlooks the realities of the nation's two-party political system:

> Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group; these political parties *are* the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves.... [E]ach major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one.

Id. at 152 (O'Connor, J., concurring in the judgment only) (emphasis in the original).

Justice O'Connor also explained why the plurality's analysis for partisan gerrymandering claims is itself evidence that a judicially-manageable standard is impossible in this context, as it will inevitably "evolve towards some loose form of proportionality." *Id.* at 155. She predicted that extending the rights protected by vote dilution analysis to groups would complicate judicial review by increasing the number of competing claims to equal group representation, *id.* at 156, and noted the additional layer of complexity added by the fact that individuals' voting patterns are not immutable. *See id.* For the judiciary to adjudicate a partisan gerrymandering claim under the *Bandemer* plurality's analysis, they must look for "some form of 'undue' disproportionality with respect to electoral success ... because otherwise they will find their decisions turning on imponderables such as whether the legislators of one party have fairly represented the voters of the other." *Id.* at 157.

Justice O'Connor also predicted the inevitable consequence of holding partisan gerrymandering justiciable and the havoc it would wreak upon the judiciary as it tried to negotiate the redistricting thicket:

> The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. *If members of the*

> *major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation* in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups. Even if there were some way of limiting such claims to organized political parties, *the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court.* Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

Id. at 147 (O'Connor, J., concurring in the judgment only) (emphasis added).

This case is the incarnation of Justice O'Connor's fears. The redistricting plans to be put in place under the 2000 Census offered both major parties an opportunity to try to influence state legislatures to draw districts holding greater promise of electing members of their party. If a party perceived that a state's enacted plan might alter the balance of representatives in that state, as happened here, there was great incentive to litigate a partisan gerrymandering claim and attempt to get the federal court

to draw the plan. Since federal courts are not permitted to undertake constitutional partisan gerrymandering, plaintiffs hoped that an expected loss of seats might be prevented.

A situation very similar to that which occurred in Pennsylvania took place in Michigan and Florida. *See O'Lear*, *supra*, and *Martinez*, *supra*. In each state, plaintiffs wanted the federal courts to throw out a congressional redistricting plan enacted pursuant to that state's legislative process. To permit challenges to duly-enacted congressional redistricting legislation on the basis of partisan gerrymandering delegitimizes the political process that this Court has recognized time and again as the preferred method for redistricting. *See e.g., White v. Weiser*, 412 U.S. 783, 794-96 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *Wise v. Lipscomb*, 437 U.S. 535, 539-540 (1978); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'reapportionment is primarily the duty and responsibility of the state through its legislature or other body, rather than of a federal court'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

The political party which lost its bid in the congressional redistricting battle in Pennsylvania's General Assembly simply re-waged the battle in federal court. It is appropriate for this Court to contemplate whether a decision of the highest court in the land that facilitates this tactic is advisable.

CONCLUSION

For the foregoing reasons, the three-judge court's January 24, 2003 order in *Vieth III* dismissing the partisan gerrymandering challenge to Act 34 should be summarily affirmed.

Respectfully submitted,

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